

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

LISA MENNINGER,

Plaintiff,

v.

PPD DEVELOPMENT, L.P.,

Defendant.

Civil Action No.
1:19-cv-11441-LTS

BEFORE THE HONORABLE LEO T. SOROKIN, DISTRICT JUDGE

MOTION HEARING

Tuesday, March 8, 2022
10:04 a.m.

John J. Moakley United States Courthouse
Courtroom No. 13
One Courthouse Way
Boston, Massachusetts

Rachel M. Lopez, CRR
Official Court Reporter
raeufr@gmail.com

A P P E A R A N C E S

On behalf of the Plaintiff:

HARTLEY MICHON ROBB HANNON, LLP
BY: PATRICK J. HANNON AND HAMPTON M. WATSON
155 Seaport Boulevard
2nd Floor
Boston, Massachusetts 02210
(617) 723-8000
phannon@hmrhlaw.com
hwatson@hmrhlaw.com

On behalf of the Defendant:

OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.
BY: RACHEL REINGOLD MANDEL
One Boston Place
Suite 3500
Boston, Massachusetts 02108
(617) 994-5700
rachel.mandel@ogletreedeakins.com

P R O C E E D I N G S

(In open court.)

THE DEPUTY CLERK: The United States District Court for the District of Massachusetts is now in session, the Honorable Leo T. Sorokin presiding.

Today is Tuesday, March 8, 2022, and we are on the record in civil case number 19-11441, Lisa Menninger versus PPD Development, LP.

And would counsel please identify themselves for the record.

MR. HANNON: Good morning, Your Honor.
Patrick Hannon behalf of the plaintiff.

I'm with my colleague, and I'll let him introduce himself.

MR. WATSON: Good morning, Your Honor.
Hampton Watson for the plaintiff.

THE COURT: Good morning.

MS. MANDEL: Good morning, Your Honor.
Rachel Mandel for Defendant PPD.

THE COURT: Good morning.

MS. MANDEL: Good morning.

THE COURT: Okay. So I've read all the papers, and I'll hear you on -- I'll hear you first, Ms. Mandel, because it's your motion.

And let me ask you this, just to jump into it. So

1 one of the questions here is what are the essential
2 functions. Okay. So --

3 And I'll just tell you, because some of this,
4 Mr. Hannon or Mr. Watson, I'll be looking to you to respond
5 to, too.

6 The way I -- I want to -- maybe correct me if I
7 don't have it right or you see a different way to look at it,
8 but the way I see this is, it's conceded that in December of
9 2017, Mr. Mekerri -- is that how you say his name?

10 MS. MANDEL: Mekerri, Your Honor.

11 THE COURT: Mekerri. Mr. Mekerri has a
12 conversation with her and says, "You're going to have to do
13 more public-facing things. Business isn't as good as it was,
14 and everybody's going to do more public-facing things." And
15 then in February, he sends an e-mail that -- much more
16 specific about what kinds of things.

17 And of course, in between those two things, after
18 the first conversation and before the e-mail, she discloses
19 the disability that she has and indicates that it impacts her
20 ability to do these public-facing kind of client larger
21 gatherings, and so forth.

22 So what I'm wondering is, on the one hand for you,
23 Ms. Mandel, given that -- that she hadn't done these things
24 before -- not zero, but she hadn't been doing that much of
25 them before, at least viewing the record favorably to her, as

1 I must, why doesn't that create -- what I'm wondering is why
2 doesn't, on the one hand, that create a disputed issue as to,
3 (a), whether all of those things are really essential? Or
4 even if they are essential, whether they're essential to the
5 extent described?

6 And given, (a), that she hadn't been doing them,
7 that it's not -- it doesn't mean that you don't win that at
8 trial, but it's not crystal clear -- is it -- I'm wondering
9 if it isn't insufficiently clear on a summary judgment record
10 that to the extent -- it's not as if there's like this CEO
11 sends an e-mail to every senior executive that says
12 everyone's increasing, everyone has to do the following 22
13 things, and it applies to her, too. And then you might still
14 have a reasonable conversation discussion, or is it essential
15 to her. So that's one thing I'm wondering. Why isn't that
16 essentially a fact question?

17 And -- and the other part is, what's the
18 significance -- it also seems, in the record, that then she
19 responded by saying, on the one hand -- I mean, there's a
20 resolution as to a couple things, a reasonable accommodation
21 requested and agreed to as to some of the items. And as to
22 the other items, the companies says, "Well, those aren't," --
23 like, "Can't do that." And at least facially the company is
24 saying, "We want to be in dialogue." And she's saying,
25 facially, "I can do everything that's required of my job, no

1 problem, without any accommodation. Why don't we wait and
2 see." And then there isn't -- before she goes out on leave,
3 unless I'm missing it, there isn't an instance where she
4 someone says, "Hey, go do this client meeting," and she says,
5 "I can't do it without" -- "I can't do it at all," or, "I
6 can't do it without an accommodation."

7 So I'm wondering about the significance of that, if
8 I'm right about that factually.

9 MS. MANDEL: Excuse me just one minute. I'm just
10 making sure --

11 THE COURT: Sure. Take your time.

12 MS. MANDEL: Thank you, Your Honor, for raising
13 those questions.

14 THE COURT: Sure.

15 MS. MANDEL: So Your Honor, the essential functions
16 of the job come up, both in the context of the summary
17 judgment papers, as well as brother counsels' motion to
18 strike. Right? This question of what were the essential
19 functions of the job and where there may be a factual issue
20 there. We think the record is absolutely full of numerous
21 pieces of evidence that demonstrate that there are very, very
22 basic essential functions of the job that are established in,
23 you know, human resources recounting of the job description.
24 Right.

25 And as I'm sure Your Honor is familiar with --

1 THE COURT: So what I'm struggling with is not
2 whether -- the idea that someone at her level would never
3 communicate with more than one human being at a time and
4 never communicate with a client, except by e-mail, seems
5 rather not that reasonable. And that doesn't seem to be the
6 record. But that's not really the question. Right?

7 The question, I think -- or what I'm struggling
8 with is that it -- it seems like she wasn't doing a lot of
9 client-facing -- I mean, she wasn't going to a lot of client
10 site visits, a lot of sales pitches. You could see why
11 someone in a company would want someone in her role to do
12 that. They might not, but if someone told me they did, that
13 would just seem like in the ordinary course. And some it
14 wouldn't surprise me at all. But they clearly are asking her
15 to do more. Right? That seems plain.

16 And so the -- what I'm wondering is whether that
17 more -- like let's say that the e-mail were simplified and
18 said, "We want you to do a client meeting with -- with the
19 sales teams going out to do all of these client pitches. We
20 want you to do one of those pitches every month. Okay? And
21 each time there's a pitch, there's five sales -- people from
22 the sales team, there's you, and there's going to be
23 typically ten to 15 people from the client. And it's a --
24 you know, a two-hour presentation, and you're going to have a
25 15-minute role, but you're also there the whole --

1 presentation there, you're there the whole time also to do Q
2 and A." That would be very discreet and fixed, and we could
3 have an argument whether that's essential or not and whether
4 there's a reasonable accommodation or not.

5 So that's what I'm wondering. It seems like an
6 increase, so how do I decide on summary judgment that all
7 these things, as described in the February 6th e-mail, are
8 essential? Or how do I decide what she can and can't do?

9 MS. MANDEL: Well, Your Honor, there's ample
10 evidence that in 2017, before Mr. Mekerri was aware in any
11 way that Dr. Menninger had an alleged disability, that he
12 said quite clearly that she needed to be involved in more
13 client-facing interactions and that that was a goal we know,
14 the record is as clear, that 2017 --

15 From 2016 into 2017, the company discovers some
16 challenges --

17 THE COURT: But what is one thing -- okay. I agree
18 with you, the record is clear that the company wasn't fully
19 happy with her in 2017. And the record is clear that in
20 2017, he told her, "You have to do more client-facing
21 things." But which of those additional client-facing things
22 is essential, and which couldn't she do without an
23 accommodation? And which -- like that's the question that
24 I'm wondering. How do I know?

25 MS. MANDEL: Well, Your Honor, if I may jump ahead

1 a minute, because I think it will help.

2 THE COURT: Go ahead. Wherever you want.

3 MS. MANDEL: I you want to jump to Dr. Kessimian's
4 recommended accommodations, which were actually the only
5 requested accommodations that the company received, even
6 though the company sought additional clear, perhaps more
7 practical, accommodations. The only ones that they ever
8 received were from Dr. Kessimian. And Dr. Kessimian
9 specifically said that -- I'm just looking for the language,
10 Your Honor -- for client visits, issue resolution calls, and
11 meeting at the Highland Heights lab, that plaintiff will be
12 available via e-mail, text, remote video conferencing for a
13 representative of the client, one to two audience maximum.
14 If it is a site meeting, surrogate or reader, with all
15 necessary information, will be available.

16 So in other words, the documentation from
17 Dr. Menninger's physician and the requested accommodations
18 essentially removed Dr. Menninger from, really, any client
19 meetings.

20 THE COURT: So your position is, from that, then
21 that's saying, "I'm not going to do in-person, any client
22 meetings."

23 MS. MANDEL: It's very clear that that's what
24 Dr. Kessimian --

25 THE COURT: But what I do with her e-mail later --

1 "her," being the plaintiff's e-mail later, that says, "Look,
2 I can do everything that's essential and required of me,
3 without an accommodation"? And -- and then it's not as if
4 someone said to her, "Go to this client meeting," and she
5 said no.

6 MS. MANDEL: Well, Your Honor, Dr. Menninger really
7 took the position -- there's great evidence on the record
8 that she took the position that she really didn't need to
9 engage in these client meetings, even though predisclosure of
10 disability, it's clear the company said you do need to be
11 more involved.

12 THE COURT: Correct.

13 MS. MANDEL: In fact, the only documentation
14 received from a medical standpoint said she can't do any of
15 that.

16 So I actually think that this Court need only find
17 that there was a piece -- a piece of the required elements of
18 the job that required those in-person, interactive
19 communications with clients. It doesn't have to necessarily
20 be a finding that it is, you know, 25 percent of the job.
21 Right? Something that you might say is a factual
22 determination --

23 THE COURT: You mean, even if I decided that an
24 essential part of her job was once a year to go to one client
25 meeting, that if I decided that was an essential feature of

1 her job, then you would say -- first you would say I should
2 find at least that much is an essential feature because of
3 what Mekerri said to her in December, and that then I should
4 decide that she can't do that based on the doctor's letter.
5 And then that's it.

6 MS. MANDEL: Well, Your Honor, I think that -- I
7 mean, I guess the simple answer is sort of, but I think it's
8 probably a little bit more nuanced than that. Right?

9 So standing here today as a lawyer, as a litigator,
10 right, this is part of my job to be here. Right? And there
11 are sometimes when I may have to do more of this and
12 sometimes when I have to do less of this. But if I could
13 never do this, that might truly interfere with me being able
14 to work as a litigator. Right.

15 So it's a similar finding here that I think is
16 quite clear for the record. It wasn't necessarily every day,
17 every hour that Dr. Menninger was being asked to have this
18 type of interaction, but it was truly a part of her job.
19 That's well documented, as I mentioned, before there was ever
20 a disclosure of disability. And I don't think it requires a
21 factual interpretation of exactly how often or with exactly
22 how many people to find that the company reasonably required
23 that Dr. Menninger be able to have these interactions.

24 I mean, Dr. Menninger, it's clear from the record,
25 again, was a senior, highly paid physician, running a set of

1 labs. So to have this expectation that Dr. Menninger would
2 be able to interact with clients, it's clearly -- it's quite
3 clear on the record that that was a requirement.

4 THE COURT: So how do I deal with the fact that she
5 says, "Can't do that" -- I'm sorry, "I can do that"?

6 MS. MANDEL: And the record, again, in this regard,
7 the Court could look at it and say, "Well, it looks
8 complicated." Right? These cases often, plaintiffs say,
9 "Oh, look at how complicated" --

10 THE COURT: Sadly, that's how every case looks to
11 me.

12 MS. MANDEL: But it's actually fairly
13 straightforward. Dr. Menninger presents documentation. She
14 says, "I have this disability," presents, documentation
15 saying quite clearly, cannot do the following things. Right?
16 For lack of a better way to describe it, a Cyrano de Bergerac
17 type of assistance to do the required meetings; you know,
18 seeking a surrogate, a reader, right, those are the words
19 that are used.

20 And then the company goes back and says, "We
21 actually will allow you to do that for internal meetings. We
22 will reduce your -- we will work something. You cannot" --
23 right, which was a patently reasonable position for the
24 company to say, "We cannot prevent you from every having to
25 interact with clients in meetings."

1 And at that point, Dr. Menninger, it takes a couple
2 of communications, although it's not actually over a very
3 long period of time, that Dr. Menninger says, you know, "You
4 need to be clear about what I have to do in my job."

5 The company is clear.

6 She says, again, "These are my requested
7 accommodations," and then Dr. Menninger removes herself from
8 the process. Dr. Menninger says, "No, wait a second, I can
9 do this job. Let's wait until something comes up that sort
10 of pushes me on this."

11 Well, in the meantime, Dr. Menninger's physician
12 has said Dr. Menninger cannot do these things and requires
13 these accommodations, puts the company into essentially an
14 impossible position. Right. Do they have to wait until it
15 is moments before a client meeting to see if Dr. Menninger is
16 or is not able to do these things? Even though medical
17 documentation, signed by her physician, says she can't do
18 these things.

19 So Dr. Menninger sort of wanted to be able to push
20 the issue forward, kick the can down the road, and say,
21 "Let's wait and see what I'm able to do," when the only
22 information available to the company was that she couldn't do
23 these required things.

24 And then, in fact, Dr. Menninger removed --

25 THE COURT: Well, she says she can do those things

1 in that e-mail where she says kick the can down the road.

2 MS. MANDEL: Except she doesn't present any updated
3 medical documentation to say that she can. And then she
4 removed herself altogether. Right. She says, "Actually, I
5 can't be part of this process," and she removed herself. And
6 the additional documentation --

7 THE COURT: Can't be part of which process? The
8 back and forth?

9 MS. MANDEL: The back and forth or work at all.
10 Right. She goes out voluntarily on leave.

11 THE COURT: But that's a couple months later.

12 MS. MANDEL: It is, but she's -- she sort of
13 refuses to continue to engage with the company, doesn't
14 really give it a chance to play out. And in fact, it's quite
15 clear from all of the evidence, there's really no factual
16 question that as of at least June 2018, perhaps earlier, she
17 was completely unable to work in the job at all. So really,
18 from a legal standpoint, sort of ties the company's hands.

19 If they had said --

20 THE COURT: You mean she wasn't working in April
21 and May?

22 MS. MANDEL: She was -- she was working -- well,
23 there was a leave. She did take a leave. She went out on
24 complete leave without coming back at all.

25 THE COURT: In June.

1 MS. MANDEL: Right. And in fact, her own
2 physician -- there's multiple pieces of physician evidence
3 that show that she was not able to work at all as of
4 June 2018.

5 I think we can -- we can still be exactly here, in
6 different -- perhaps different factual allegations, if the
7 company had said, "Okay. You're saying you can still do
8 these things. Your doctor says you can't. Fine. We're
9 making you stay in the job. We're making you still have
10 these requirements placed on you," and sort of wait until
11 Dr. Menninger would essentially break under that pressure,
12 because the company allegedly made her --

13 THE COURT: Well, I'm just wondering, does it put
14 the onus on the company to say, "Okay. Fine. Your doctor
15 says you need a reasonable accomodation. You need these
16 accommodations," as to the three that they didn't agree to.
17 "You need these accommodations. We're not prepared -- we
18 don't think those accommodations are reasonable. You can
19 tell us a different accommodation, if you think there's
20 something else we can do to meet our needs and enable you to
21 do it.

22 "You said -- you said to us, 'Well, I can do
23 everything, and let's just table this.' But we're not
24 prepared to table it, because we don't want" -- as you point
25 out, we don't want to find out that there's a hearing for

1 summary judgment at 10 o'clock, and at 9:55, we don't want
2 you to tell us, "Oh, I need a surrogate," because at that
3 point, we're not able to be prepared and ready. And right,
4 that's your job, an essential part of your job. And so we
5 want to be prepared in advance.

6 And we see, coming up, some so-called summary
7 judgment hearing or the sales meeting, or whatever, in a
8 month. So are you telling us you're withdrawing? The
9 doctor's advice is no longer accurate? Are you telling us
10 that you can do that and sort of, like -- that's what I'm
11 wondering. Did they need to press that point?

12 MS. MANDEL: Well, in fact, they did really press
13 that point, right? Throughout those e-mails in March and
14 April, the company is saying, "Give us" -- you know, "Give us
15 more. If there's some other accommodation that you think
16 that we can provide, your doctor thinks that we can provide,
17 tell us." That's where the company absolutely is pushing
18 back and saying, "You know, please tell us more. Tell us
19 what other accommodations we could provide."

20 And that's when -- Dr. Menninger never does that.
21 She never comes back and says, "Here's additional information
22 from Dr. Kessimian," or, "Here is a different list of
23 potential accommodations. Let's have a discussion about,
24 perhaps, I could do the client visits that are coming up in
25 the next couple of months. But longer term, my doctor thinks

1 that's detrimental to my health, so we have to have a
2 different plan going forward."

3 That conversation, she never picks up on it. She
4 simply says, "Let's kick the can down the road. I think I
5 can do the job," in an apparent fight to save her employment,
6 her position with the company, and it puts the company, as I
7 said, into, essentially, an impossible position. Because I
8 think we would still be here on factual allegations if the
9 company had said, "Fine. Continue to put your nose to the
10 grindstone. Let's plow forward." Right? She would have
11 said, "You're putting me in a position where you're not
12 accommodating me and making me jeopardize my health, because
13 you're continuing" --

14 THE COURT: Well, but wouldn't the -- why wouldn't
15 they say, "Okay. The doctor says you need these
16 accommodations to do the -- go to the site visit," right?
17 Because that's one of the things at the client that they
18 didn't agree to an accommodation to, right?

19 MS. MANDEL: (Nods head.)

20 THE COURT: You just have to say "yes" or "no" for
21 her. I know what you mean.

22 MS. MANDEL: I'm sorry. Yes.

23 THE COURT: And then she has said, "Well, I can do
24 it."

25 Well, does that put the onus on them to say, "Okay.

1 There's a client sales meeting coming up in May, and it's the
2 kind of -- it's not made up. It's one we think that -- one
3 we think we want you to come to. It's part of your job.
4 This is one you should come to." It's a summary judgment in
5 your case, to borrow your example, as opposed to a summary
6 judgment in somebody else's case. Right?

7 And so, you know, "You tell us" -- "that
8 accommodation you propose, that your doctor proposes, no
9 good. You tell us you can do it? Okay. Are you going to be
10 able to do that, because that's one we're going to want you
11 to come to. And if there's another accommodation that you
12 can think of, we're happy to engage in that process."

13 And then now I hear what you're saying; the company
14 doesn't have to wait for her to, like, fail -- quote/unquote
15 fail and lose the client in order to resolve the issue. But
16 I'm just wondering if they had to -- like one more round like
17 that, so to speak.

18 MS. MANDEL: And I think that's a very reasonable
19 question, Your Honor. On March 24, 2018, what Dr. Menninger
20 said was, "Let's stable this discussion until a particular
21 task arises." So she's asking the company to sort of, as
22 Your Honor says, just wait, right, until something comes up.

23 So to put that in greater context, though, which
24 is, again, really clearly shown in the factual record and
25 does not require any additional factual showing before the

1 finder of fact, previous to this time, the company had been
2 allowing Dr. Menninger to severely limit her travel, to step
3 back from some of these tasks -- some that had already been
4 happening. Right? Dr. Menninger had not been sort of
5 working in every capacity requested of her up until March 24,
6 2018, and then said let's kind of see how things go. There
7 had already been really a pulling back from some of these
8 requirements. So the company had already been, you know,
9 accommodating that and letting that be while this
10 conversation was playing out.

11 At this point, what Dr. Menninger says is not, you
12 know, "Never mind. I retract all of that. I think I can do
13 all of it." What she said is, "Well, I think I can still do
14 the job tasks required of me. Let's see how it plays out in
15 context."

16 Dr. Menninger, as the record also shows, said,
17 "Those were not really requirements of my job." Right? So
18 there was a dispute there, where Dr. Menninger was saying, "I
19 shouldn't have to do those things, and you shouldn't be
20 requiring those things of me." She wasn't saying, "I will be
21 able to show up and do all the things that senior management
22 is asking of me, and I'll be able to get it done, don't
23 worry." What she's saying is, "You're not being reasonable
24 in asking me to do these things from the get-go."

25 And I think that's an important, sort of, piece of

1 the factual story to keep in mind, that she didn't actually
2 acknowledge that some of these things were required of her
3 position. She wanted to be able to sit at her home, in
4 Dighton, Massachusetts; be working in a lab in Highland
5 Heights, Kentucky, where she wasn't present; and she wasn't
6 present at client meetings.

7 And of course, this is all before the pandemic, so
8 this was at a time when real in-person interaction was a
9 significant portion of, essentially, every company's business
10 model, including PPDs, and she was saying, "I shouldn't have
11 to do that. So for now, let's wait. I can still do my job."

12 I think she saw the writing on the wall that she
13 wasn't going to get everything that she had asked for, so she
14 said, "Well, let me do my job the way I think I should do my
15 job, and when this comes up in context, we'll address it."
16 That is unreasonably asking PPD to essentially accept
17 Dr. Menninger's view of what the job required, which they had
18 been doing for some time, expecting them to continue to do
19 so, and then wait until, as Your Honor says, the morning of
20 the summary judgment hearing to find out whether she can or
21 can't do it. And that's not a reasonable expectation of a
22 business trying to stay operational and work with clients and
23 customers.

24 THE COURT: So your bottom line is -- so what
25 you're saying, though, is, essentially, preknowing about the

1 disability, they made clear that client-facing meetings were
2 a significant part of her role, whether you want to call that
3 a shift in priority or a new essential function that
4 wasn't -- because she wasn't doing a lot of that before,
5 right?

6 But one way or another, it was other -- it's for
7 the company to decide what's essential. They did. They laid
8 that out. The big picture, they said that this is happening
9 in December. They specified it after they learned about her
10 disability, specific things. But she didn't want to do any
11 of it and wasn't really able to do the external part. The
12 internal part, they're willing to accommodate, and they
13 could. And so that's why she can't do an essential function
14 of a job, and without that, there's no discrimination claim.

15 MS. MANDEL: Correct, Your Honor. And in fact,
16 Your Honor just touched on an important piece, which is that
17 Dr. Menninger, herself, and her counsel has quickly
18 dispensed, repeatedly, what the company did to accommodate
19 the request regarding internal meetings, which I think is
20 important for the context here, again, to think about what
21 might need to go to a finder of fact.

22 If the company had said -- which I actually think
23 is legally supported -- if the company said, "Actually, we
24 can't really allow this kind of surrogate-type of
25 communication for any of your communications," right, it was

1 one thing if you were, perhaps, not the face of the lab, if
2 you were lower level.

3 This is a very high-level position that allows for
4 the -- it's the licensing of the labs across the world. So
5 this is a really important role. We can't sort of remove you
6 from those internal discussions. But the company said we'll
7 do it. We'll eliminate that requirement for you, so we can
8 sort of help you here. And I think that shows the greater
9 context.

10 Again, we may be have a different discussion if the
11 company had just said no to everything. But it shows that
12 the company was trying to make these adjustments where it
13 could, right, and say we'll help you when it comes to these
14 internal meetings, because basically we can, sort of, cover
15 for the fact that the executive director of labs is not
16 really present for some of these meetings. But for the
17 external ones, we can't, which is part of doing business. I
18 mean, that is a reasonable thing for the company to say, and,
19 in fact, the company really did more than was reasonable or
20 required under the law in that regard.

21 I think that it's also, again, looking at that
22 timeline, I understand Dr. Menninger has tried to, sort of,
23 paint that timeline differently now, but the evidence is
24 quite clear that in, really, the sort of end of that
25 discussion between Dr. Menninger and the company about the

1 accommodations, at the beginning of April 2018, when HR
2 reiterated to Dr. Menninger that the company would remain
3 open to discussing accommodations and that she should let
4 them know if she had questions.

5 At that point, Dr. Menninger sort of pivots.
6 That's when she makes her complaint that Mr. Mekerri wasn't
7 treating her fairly. But that conversation really just, sort
8 of, ends. Dr. Menninger doesn't come back and say, you know,
9 "Let me ask for something different. Let's continue this
10 discussion."

11 THE COURT: So for retaliation, the protected
12 conduct is that complaint that you just referred to? Or is
13 the protected conduct the claim of disability or both?

14 MS. MANDEL: I would like to limit it, of course,
15 right, on my side of the case, and say it's really quite
16 limited, right, that in April of 2018, she makes this
17 complaint, understanding the complaint, as it's been alleged,
18 and the record.

19 And I know brother counsel will make the argument
20 that it's broader; that she brought forth a -- showed that
21 she had a disability in January of 2018, and after that, she
22 claims that Mr. Mekerri began to treat her differently.

23 I think that it doesn't matter, sort of, which lens
24 you take. It's quite clear that she -- first of all, that
25 her complaint, in its entirety, was fully and thoroughly

1 investigated. It's not, as brother counsel says, a sham
2 investigation.

3 And that, in addition, there was absolutely a
4 reasonable finding that there was no retaliation, no adverse
5 treatment. In fact, Dr. Menninger had no adverse employment
6 action that really impacted her, until the company,
7 reasonably, after eight months of this extended leave,
8 separated her from employment. She moved on to -- she was
9 moving on to long-term --

10 THE COURT: What about the hiring decisions?

11 MS. MANDEL: Again, the record is clear that
12 Dr. Menninger herself, before disclosing a disability, had
13 said, "This is all too much for me to manage"; and that
14 Mr. Mekerri reasonably said --

15 THE COURT: But isn't there a disputed issue of
16 fact as to -- I know he says -- both of them agree, she said
17 she was overwhelmed. But whether she said she was
18 overwhelmed in the vein of -- like somebody says, "Oh, my
19 God, I'm overwhelmed at work today," or, "I'm overwhelmed; I
20 need to shed responsibilities," she suggests that it's the
21 first, rather than the second.

22 But either way, what is the record evidence that he
23 told her that, "I'm removing these responsibilities because
24 you're overwhelmed," as opposed to he understood it that way
25 and just went off and did that?

1 MS. MANDEL: So Your Honor, I think the record
2 evidence is clear that she said, essentially, "I kind of
3 can't do everything being asked of me," in December of 2017,
4 be so before disclosing the disability. Very, very
5 credibility evidence that Mr. Mekerri had no idea that
6 Dr. Menninger had a disability before that point and that she
7 said, "I'm overwhelmed I can't do this." It was a clear
8 requirement that he had for her, and he said, "Okay. Let's
9 kind of redistribute the work. I'll help with that hiring
10 piece." I think that record evidence is clear.

11 But I would also say it really doesn't matter,
12 because, first of all, all of this happened prior to the
13 disclosures of the disability. And the record evidence is
14 clear, I don't think there's any dispute --

15 THE COURT: When you say all this happened, the
16 "this" being the decision to take that responsibility away?

17 MS. MANDEL: Yes. I'm sorry. Right, the decision
18 that that would be, sort of, pulled off to Mr. Mekerri,
19 right, that he would just take care of that piece and not
20 include Dr. Menninger.

21 There's also this other piece of the evidence,
22 which I think helps shed light on this, which is that the
23 company had concluded -- Mr. Mekerri had concluded, and
24 others within management, that there were certain aspects of
25 Dr. Menninger's job --

1 The company, as a whole, was kind of taking a
2 closer look in 2017 at to where they felt that there was some
3 failings that led to business losses, and they decided that
4 focusing more on client-facing meetings, focusing more sort
5 of on the functioning of the lab, that was really important
6 for the company and for Dr. Menninger. And so to, sort of,
7 take some of these ancillary tasks that were more --

8 I believe one of the piece of testimony talks about
9 it being more a HR-type of test, taking it out of her hands
10 and letting someone else handle it, was going to be good
11 overall so that Dr. Menninger could focus on the real needs
12 of her position.

13 But either way, all of that happened prior to the
14 disclosure of the disability. It all happened in 2017,
15 squarely in 2017, up until December of 2017. So it really --
16 whether it was, you know, Dr. Menninger said "X," which led
17 Mr. Mekerri to do "Y," it doesn't matter, kind of, which
18 version of the facts prevailed there because that --

19 THE COURT: It's not a retaliatory decision if it
20 happened beforehand.

21 MS. MANDEL: Exactly. And the record evidence was
22 also clear that that was not a fundamental portion of
23 Dr. Menninger's job.

24 I would also point out an additional factor there,
25 which is that given the evidence is quite clear that

1 Dr. Menninger's own treating physician, and, in fact, expert
2 physician, talk about -- have both testified at length about
3 Dr. Menninger's, sort of, difficulty, really inability, to
4 have that type of external communication. There could be an
5 additional finding that Dr. Menninger really wouldn't have
6 been able to do that, even if she had that task assigned to
7 her in 2018.

8 I mean, there are just a number of reasons that
9 there's no nexus between the decision for Mr. Mekerri to take
10 over that hiring and Dr. Menninger disclosing a disability in
11 January of 2018.

12 THE COURT: What about the fact that there's a fair
13 bit of evidence in early 2018, after they've learned about
14 the disability, that they're basically looking to get rid of
15 her?

16 MS. MANDEL: Your Honor, could I just ask for a
17 clarification about what specifically?

18 THE COURT: Well, there's e-mails and statements
19 about how do we ease her out. There's a disputed issue of
20 fact as to how much of the conversation that first -- that
21 conversation in February about the accommodations, how much
22 of it to start out with. Maybe it could be a consultant or
23 an exit package.

24 But I have to take her version of it for summary
25 judgment purposes, so that's a stronger version of it. You

1 know, walk into the meeting and talk about accommodations and
2 say, "How would you like to segue to a different,
3 outside-the-company role?"

4 So it seems that people were unhappy with her and
5 that they were -- so I guess my question is, what -- how does
6 that fit into the retaliation analysis?

7 MS. MANDEL: Well, Your Honor, first of all, the
8 evidence is clear that the company never took any steps to
9 move Dr. Menninger out of her position. In fact, even once
10 Dr. Menninger herself said, "I'm, kind of, removing myself.
11 I'm going on out on a leave," the company did everything in
12 its power to keep her employed in that position for months,
13 paying her. She was receiving full pay for months.

14 And so even if Dr. Menninger now says, "Oh, the
15 company was trying to push me out in that February time
16 period," even if we jump to June, she was still employed;
17 even if we jump six months later, she was still employed. So
18 if the company was truly looking for a way to push her out,
19 it seems quite clear that they would have done something
20 earlier to try to ease her out.

21 In addition to that, even taking Dr. Menninger's
22 version of what happened in that February meeting, again to
23 put it back into that context of, you know, the lawyer who
24 can't make a summary judgment argument in person, it would
25 be -- I think the record is quite clear, it would be like

1 walking in and saying, you know, "I understand you can no
2 longer speak in court. Let's explore some other things that
3 you might do. Like, how can we help you in this situation?
4 Do you want to stop being a lawyer? Do you want to be a
5 different type of lawyer?" It wasn't saying, "You are unfit
6 to do this job. We need to move you out. Here's a severance
7 package." It's, "Let's have a more global discussion about
8 what the options might look like."

9 Could it be done more artfully to prepare us for
10 litigation? I suppose. But that's not real life.

11 THE COURT: Well, that's every case.

12 MS. MANDEL: Exactly. Exactly. And there's no
13 indication that the company was taking any steps to move
14 Dr. Menninger out, that they took steps to demote
15 Dr. Menninger. Often, Your Honor, of course, we're here with
16 facts where there's some time of demotion or attempted
17 demotion. There's nothing like that at all.

18 Dr. Menninger stays in that position, even when the
19 company essentially had to scramble to cover her job over a
20 lengthy period of time when she was gone all together. The
21 company did that. So it sort of belies this allegation that
22 the company was trying to move her out even after the
23 February of 2018. It just doesn't match up with what
24 actually happened.

25 THE COURT: Okay. Let me see what the plaintiffs

1 have to say.

2 MS. MANDEL: Thank you, Your Honor.

3 MR. HANNON: Thank you, Your Honor.

4 Any place in particular you care for me to start?

5 THE COURT: No. Same -- I have sort of the same
6 basic questions.

7 MR. HANNON: Sure.

8 THE COURT: First, with respect to essential -- I
9 mean, what about essential? Why isn't Ms. Mandel right, that
10 2017, he said to her that more public facing, the client
11 meetings. Okay, fine. The internal stuff is accommodated or
12 they're willing to accommodate. But they said they can't
13 accommodate it on the client facing, and she's essentially
14 saying, "Can't do that." And why doesn't that matter to
15 discrimination, not retaliation?

16 MR. HANNON: Sure. Specifics matter, particularly
17 in the area that we're talking about accommodating
18 disabilities. And to simply say that we want more certainly
19 begs the question of what more do you want. And to the point
20 of essential accommodations, what more do you need? And they
21 never answered that question of what the more was.

22 There's been a lot of talk about Ms. --
23 Dr. Menninger's e-mail on March 14th, where she suggests
24 maybe they sort of step back from the discussion. But a lot
25 happened before then. Dr. Menninger asked, over and over and

1 over again, for PPD to provide additional detail concerning
2 the items listed in buckets two through four. She did that
3 in that February meeting that was referred to earlier, where
4 they only wanted to talk about a separation package.

5 She followed that meeting up with --

6 THE COURT: I don't know if the record suggests
7 that they only want to talk about --

8 MR. HANNON: Correct, Your Honor. I was
9 paraphrasing.

10 THE COURT: Right. Yeah.

11 MR. HANNON: But they certainly made clear that
12 they did not want to talk about what she could or could not
13 do in those buckets two through four. In fact, there's an
14 internal e-mail that's in the record here, where it's sort of
15 made clear they don't want to engage in that discussion
16 because they don't want to have a tit for tat about you can
17 do this, but you can't do that. They simply didn't want to
18 get down to that level of, sort of, granular detail, which is
19 what the law requires them to do.

20 Immediately after that meeting ends, she writes
21 them an e-mail. She tells them, "I like my job. I want to
22 keep my job. I think we can work this out. I just need to
23 know more about buckets two through four."

24 They respond to that e-mail by cancelling the
25 follow-up meeting that had been scheduled to talk about the

1 accommodation requests.

2 Days, perhaps a week, week and a half pass. They
3 come back with an e-mail. Did they provide any additional
4 detail about buckets two through four? No. It's like an
5 auto bot response, "Thank you for this continued dialogue.
6 We appreciate working with you. Here are the references in
7 your -- in your job description of what you're required to
8 do. If there's anything that you think we can do to help,
9 please let us know."

10 She responds to that, and she says, again, "Thank
11 you for telling me about the job description. My question
12 pertains to buckets two through four. If we can just talk
13 about some additional detail about what's involved in there,
14 we can try to work something out."

15 Again, they don't respond. She gets back the same,
16 essential, auto bot response of, "We enjoy this continued
17 dialogue. We're going to work with you. As you know, your
18 job description requires X, Y, and Z."

19 To your question about what are the specifics in
20 bucket two through four, PPD's counsel didn't answer that
21 question then. They didn't answer that question ever during
22 this ongoing dialogue -- this alleged dialogue they were
23 having with Dr. Menninger. She asked the question over and
24 over again.

25 THE COURT: But isn't it sort of like Ms. Mandel's

1 analogy in the sense that, okay, they decided -- and you
2 didn't dispute this fact; I assume, because it's not
3 disputable -- that they told her in 2017, "You have to do
4 more public-facing activities." Now they've specified it a
5 little bit in 2018, and she's -- her doctor is saying she
6 can't do public-facing things. We have to have a surrogate.

7 It's not unreasonable, especially in the preCOVID
8 world that they were operating in, to think that if we're
9 flying one or several people out from this big company to a
10 client for a face-to-face meeting, that we can't have a
11 surrogate. You know, without further evidence, that's
12 like -- it seems like a reasonable position.

13 So the more details, like I could see her saying --
14 her responding, "If, like, okay, I can't do that, I can do --
15 I can do other things for the company that isn't that, and
16 here's a way to shift my role to some degree."

17 There are -- to take Ms. Mandel's analogy, there
18 are lawyers who perform supreme services at law firms, and
19 they never walk into a courtroom and they work on cases that
20 go to court. They're the -- you know, for lack of a better
21 term, they're the people who write the briefs. Sometimes
22 they're the brains of the operation, as opposed to the -- no
23 disrupt to the two of you -- the talking head. But right,
24 there are firms that work that way or lawyers that work that
25 way and have relationships that way.

1 And so -- but that's not a pressing for more
2 granular detail of how many more oral arguments; it's other I
3 things that I can do. Right?

4 I'm just wondering how you get around her point of
5 the public facing.

6 MR. HANNON: Sure. So just to correct a couple
7 things from the record, first, there's certainly evidence
8 that there was a proposal in 2017 that she might include
9 increased marketing activities as a goal. I don't think it's
10 fair to characterize that as that being some kind of a --
11 some kind of a demand or something that they --

12 THE COURT: Well, all executives -- paragraph 19,
13 "All executives are being asked to become more proactive,"
14 comma, "especially with respect to outward-facing meetings
15 and presentations."

16 You've disputed -- I'm not -- it doesn't really
17 matter. You had a dispute about how unsuccessful,
18 relatively, 2017 was. I confess, between the two of you, I
19 was struggling a little bit to understand the difference, but
20 it doesn't matter because you then said otherwise your
21 dispute is only with respect to the first sentence, where it
22 says that 2017 was relatively unsuccessful. What I just
23 quoted was the last -- third sentence of paragraph 19. You
24 said otherwise undisputed.

25 So she is being asked to be more proactive and

1 doing more outward-facing meetings.

2 MR. HANNON: That that was suggested as the goal.
3 Correct. So then you actually look at the goals that were
4 actually agreed upon for that year, and it's not reflected
5 there as actually being something that they decided to make a
6 goal for her.

7 THE COURT: Well, but that's in December of 2017,
8 before 2018.

9 MR. HANNON: Correct. And there's talk about,
10 again, renewed idea of maybe this is somewhere where you can
11 potentially contribute more. And there's no doubt that they
12 would have liked her to contribute more to marketing
13 activities; the somewhat ironic part of that is because they
14 thought she was good at it. When she was in front of people,
15 it came across how incredibly smart and --

16 THE COURT: Well, some of them sort of -- most
17 senior executives, it's always the -- the business is to get
18 business.

19 MR. HANNON: Not always, Your Honor. This was a
20 very, very technical role.

21 THE COURT: Sure. Technical role, but I can see
22 why -- I don't know, Pfizer, or some big pharmaceutical
23 company, hires them to do lab work, but whoever, they must
24 have big customers, right? They're a big company. I can see
25 how those -- like somebody in the company says, "I want

1 to meet with the -- "who's doing the lab work that we're
2 paying you this millions or hundreds of millions or tens of
3 millions of dollars? And I want to take a tour of the lab,
4 and I want to meet with -- I want to have your lab director,
5 who has all of your certifications, meet with our people to
6 talk about it."

7 And that's not the person who is sort of the
8 salesman in the used car sales sense, right? But, like, I
9 could see how that's part of the marketing process, right?

10 MR. HANNON: Sure. And certainly if that's
11 something that they came to her and said, "This is that we
12 want you to do," that would be more specificity, right, in
13 terms of what those buckets two through four are. Or
14 examples of, "Hey, we have clients who are coming in, saying
15 they want to meet with you." There is no evidence of that.

16 There was a general urge of, "Hey, we have this
17 really, smart, awesome person who's in charge of our lab.
18 Let's try to get her out in front of clients more." And I
19 think you're right, that makes a lot of business sense.

20 But getting down to the more specific --

21 THE COURT: But it seems like it wasn't -- well,
22 actually, I don't have any reason to dispute what you say,
23 that she was a really smart, talented person, who was good
24 with clients. But it seems that the focus was that 2017
25 wasn't a banner year, and they wanted to make more money.

1 And so the decision was made to get more executives, senior
2 people more involved in marketing and sales and that that was
3 going to mean more -- some more client-facing meetings.

4 MR. HANNON: Sure.

5 THE COURT: And that's what -- and then she
6 doesn't -- and then her doctor says, "She can't do that. Get
7 a surrogate."

8 MR. HANNON: No, Your Honor. No one ever said she
9 couldn't do these things. Simply suggesting accommodations
10 is not an assertion that someone is incapable of performing
11 those tasks.

12 THE COURT: Well, it seems -- if the task -- if the
13 task is to meet with the clients, and the suggestion is that
14 that creates increased heart rate to the point of paralysis
15 of the vocal cords -- I think that was the language of the
16 doctor -- and the way to resolve that is to have someone else
17 go speak for her, that might be a reasonable accommodation or
18 it might not be. It's an accommodation for sure.

19 MR. HANNON: But it's not a statement that she's
20 incapable of performing the task. And there's sort of been
21 a --

22 THE COURT: So the -- so what you're saying is she
23 could do the task; that is, the task is to go meet with 50
24 people at Pfizer or where -- I don't know if Pfizer is a
25 potential customer, but whomever, 50 people. The statement

1 of the doctor that her anxiety that comes from social
2 situations leading to -- I think paralysis was her word -- is
3 not a statement that Ms. -- Dr. Menninger can't do that task,
4 it's a statement that it would be a reasonable accommodation
5 to allow her to have a surrogate.

6 MR. HANNON: It was a proposed accommodation.

7 And just to step back in terms of the back and
8 forth of all of this --

9 THE COURT: Sure. Okay.

10 MR. HANNON: -- because I think the context
11 matters, not just focusing on.

12 THE COURT: But then how do I -- if I'm the company
13 or I'm me, -- thinking more about me -- I'm trying to resolve
14 what -- okay. So that was an accommodation proposed. Right?

15 MR. HANNON: If I can just step back one bit,
16 Your Honor?

17 THE COURT: Yeah.

18 MR. HANNON: So Dr. Menninger makes the initial
19 disclosure to her boss. PPD, the employer, comes back, and
20 they ask her to provide, essentially, information from her
21 doctor. They give her a form.

22 THE COURT: Okay.

23 MR. HANNON: She goes and she gets the form. She
24 provides that to PPD. That is in the record as Exhibit 20.
25 And you'll see there that it identifies, you know, doing the

1 best to sort of minimize public speaking, and things of that
2 sort, and references that if those things can't be avoided,
3 trying to come up with some kind of a plan to minimize her
4 symptoms. So that's the -- that's where the second volley
5 from Dr. Menninger is. Her first e-mail was herself to
6 Mr. Mekerri, and then there's this response to her initial
7 request. She sends that in.

8 The response from PPD is, "Well, tell us what
9 accommodations you're proposing."

10 THE COURT: That came in on January 31st, the
11 doctor's letter.

12 MR. HANNON: Correct. And that's when you get
13 this, sort of, list from the doctor of, "Okay. Here are my
14 ideas of things that you can do."

15 THE COURT: Yeah.

16 MR. HANNON: To characterize that as a statement of
17 she cannot do all of these things --

18 THE COURT: So you're saying those are statements
19 of things that would be solutions to the -- to the issues
20 presented, but not necessarily the only solutions, because
21 she's willing to engage in this reasonable accommodation
22 process; and might doesn't necessarily mean that she can't do
23 those things, it just would be better if done that way.

24 MR. HANNON: Correct.

25 THE COURT: All right. So then he responds with

1 the, sort of, itemized, public-facing things, somewhat more
2 detail, even if it's not as much detail as you want. Right?

3 MR. HANNON: Actually, the --

4 THE COURT: Or did that come the other way?

5 MR. HANNON: It came the other way. So Dr. K's
6 list of proposed accommodations, that was in a response to
7 Mr. Mekerri's.

8 THE COURT: Okay. And they say, "Well, several we
9 can accept, and some we can't."

10 MR. HANNON: They say yes on one and five, and they
11 say no to the rest.

12 THE COURT: Right.

13 MR. HANNON: And she asks, "Can we talk about two
14 through four?" And they say, "Thank you for your inquiry.
15 We appreciate this dialogue, and here is your job
16 description."

17 THE COURT: Right.

18 MR. HANNON: Over and over again, which
19 simultaneously with she's seeing various signs that they're
20 trying to push her out. She sees that she's not being kept
21 in the loop with respect to hiring decisions.

22 And by the way, there's a lot of talk about when
23 did they cut her out. There's a lot of evidence in the
24 record that shows that part of the reasons why they're, like,
25 doing this particular hiring decision without her is they're

1 sort of planning for life without her. Right? They, very
2 early on in this process, recognize we're either going to
3 accommodate her disabilities, or we're going to a move her
4 out of her job.

5 And once they decide that we don't want to
6 accommodate buckets two through four, they shut down any
7 further discussion regarding two through four, and they
8 simply reach the assumption: She can't do this job --

9 THE COURT: Of course they can do that if there's
10 no reasonable accommodation.

11 MR. HANNON: They have to have a dialogue first.

12 THE COURT: Well, but if they -- right. So there's
13 a fact question, I suppose, or a question about how much,
14 under the law and the facts, how much dialogue is required.

15 If they -- they could be wrong. But if they're
16 right, that those two through four are things that are
17 needed, that are essential, if they're right, and if they're
18 right that the accommodations proposed by Dr. K are not
19 reasonable, then the question is how much -- I'm not saying
20 that -- if you're right, that they terminate a dialogue, that
21 they terminated at the right time. But at some point,
22 they're entitled to stop dialogue. They're don't have to
23 talk forever.

24 MR. HANNON: Well, it depends upon what the
25 dialogue is.

1 THE COURT: Of course, if it's reasonable dialogue.

2 MR. HANNON: Right.

3 THE COURT: For example, it certainly -- they could
4 have responded, "No to that. Tell us what -- if you have
5 another proposal. We don't see another way to accommodate
6 this. Because, in the present role, we think it's important,
7 these things are really important to us, and we don't see how
8 a surrogate," or in a preCOVID world as part of this, it's
9 not surprising that they wouldn't imagine a video appearance.
10 And so -- and if she -- and put the ball back in her court
11 and say, "Well, this is what we thought about. We don't see
12 another pathway. Do you see one? And we're happy to hear
13 you. And then tell us what you think." Right?

14 They could have some back and forth like that, and
15 if it's in good faith, at some point they could say, "Well,
16 those things, you're either not proposing anything, or what
17 you're proposing is no good."

18 And if they're right, it's different than if
19 they're wrong.

20 MR. HANNON: Sure. Just to clarify one little
21 thing. Simply saying, "No. Propose something else," that,
22 as a matter of law, is not sufficient dialogue. At the very
23 least, they were required, as a matter of law, to answer her
24 question.

25 THE COURT: Which question?

1 MR. HANNON: "Can you give me more specifics
2 regarding what your -- what buckets two through four mean,"
3 the ones she asked over and over again. Or if not answer
4 that question --

5 THE COURT: Well, they only have to answer that
6 question if it's not clear, right?

7 MR. HANNON: If it wasn't clear, why is she asking
8 the question?

9 THE COURT: Well, people ask a lot of questions.
10 Sometimes they -- my experience, no disrespect intended, but
11 the fact that someone asked a question, doesn't mean that the
12 thing that they're asking about wasn't clear. I'm not saying
13 that it wasn't clear here.

14 MR. HANNON: Sure.

15 THE COURT: But I don't think the fact that someone
16 asked a question -- it's a piece of evidence from which one
17 could see that it's not clear.

18 But I read contacts sometimes, and I think they're
19 plain and unambiguous, and it turns out that there's three
20 circuit judges that agree with me, but somebody said they
21 weren't. Well, the fact that they said it wasn't, doesn't
22 make it so.

23 So what I mean by that is the fact that she asked
24 the question, the piece of evidence from which it raises a
25 question about whether it's unclear or not -- but I don't

1 know that that's dispositive, even on summary judgment,
2 necessarily, as to whether or not it is unclear. And I
3 guess --

4 MR. HANNON: Well, but that also --

5 I'm sorry, I didn't mean to cut you off,
6 Your Honor.

7 THE COURT: No, go ahead.

8 MR. HANNON: It also goes back to your question of
9 what are the essential functions here, right, and this all
10 kind of goes in a circular loop.

11 THE COURT: Sure.

12 MR. HANNON: That's ultimately what this dialogue
13 was about -- was supposed to be about. It's: Tell me the
14 things that you really need me to do. And tell me why it is
15 that what I've proposed doesn't work.

16 So when you give the example of we can't find out
17 five minutes before a summary judgment hearing that you can't
18 argue the case, well, you get notices for summary judgment
19 hearings weeks before the argument happens.

20 And this wasn't just about her not doing it. I
21 think this is really important. She could take medication.
22 Right? There were ways for her to otherwise alleviate her
23 symptoms. Medication wasn't a great thing for her because
24 there was downtime afterwards. It took away from her time
25 doing other responsibilities.

1 She could also just plow through it. Having to go
2 and do these things took tremendous physical stress on her,
3 but she could do it. And this idea that someone who has a
4 disability, who is entitled to an accommodation, that doesn't
5 make you incapable of doing your job. Even people --

6 THE COURT: Agree.

7 MR. HANNON: -- can perform their jobs without
8 accommodations --

9 THE COURT: And the question is what is the job.

10 MR. HANNON: What are the essential functions?
11 What is the real nitty-gritty? And part of the reason that
12 they can't meet that burden here is because that dialogue
13 nerve happened, and those new responsibilities never actually
14 came into place.

15 You heard that they pulled back from those
16 requirements as part of this dialogue. There's no evidence
17 of that whatsoever, Your Honor. You can look through all of
18 these binders, Judge; you're not going to find any evidence
19 that there was some way to push those things off from
20 happening.

21 I submit to you what a jury can find is they found
22 out that she had this mental health disorder. They
23 recognized that she was a very important person in the
24 organization. They simply didn't want her in that role
25 anymore. They came up with a list of some very scary

1 described things, knowing her disability; these are all the
2 things that you're going to have to do. And when she tried
3 to have the dialogue about it, they said, "No, everything's
4 clear. We appreciate you. Here's your job description.
5 Tell us if there's something else we can do." That is a
6 violation of the law in the most fundamental sense,
7 Your Honor.

8 THE COURT: Okay. What about the retaliation?

9 MR. HANNON: I'm sorry?

10 THE COURT: What about the retaliation?

11 MR. HANNON: So the retaliation -- the retaliation
12 certainly goes back to the disclosure of the disability. I
13 mean, simply, you know, noting that she was -- that she was
14 entitled to the protections under the law, that, in and of
15 itself, is a protected activity.

16 THE COURT: So why is the investigation a sham
17 investigation?

18 MR. HANNON: Because the person who did it was the
19 one who was calling the shots throughout the whole time that
20 they were trying to move her out. The person, Ms. Ballweg.
21 She was involved from the very, very start. She was the
22 person that Chad St. John was reporting back to, getting
23 guidance on. We're going to have --

24 THE COURT: So as a matter of law, that person
25 can't do the investigation.

1 MR. HANNON: Well, she, herself, admitted that it
2 would have been inappropriate for her to do that, if she was
3 involved.

4 THE COURT: Inappropriate.

5 MR. HANNON: Yeah.

6 THE COURT: Why?

7 MR. HANNON: But then she claims that she wasn't
8 involved.

9 THE COURT: So you're saying she says she wasn't
10 involved. You say she was. And if she was -- but why does
11 that make it under the law a sham investigation? In other
12 words, just because she was involved -- let's say she was
13 involved in discussions in February to -- how do we get rid
14 of Dr. Menninger. Okay? For whatever reason, whether it's a
15 performance reason or a -- whether it's we don't want to
16 accommodate. We don't want to have a person in a high level
17 position with this disability. Okay. If she's involved in
18 those discussions, what makes it -- I mean, what are the
19 things that I look to -- I should be looking to, to determine
20 it's a sham investigation?

21 MR. HANNON: I think most fundamental the question
22 was, was she investigating herself. And that's what it
23 amounts to her, given her level of involvement that a
24 reasonable jury could find, that, in essence, she was
25 investigating herself. And that is not a good-faith effort

1 on the part of a company to determine whether or not
2 something unlawful has taken place.

3 And coupled with the fact -- and, you know, this is
4 really the rub of it is, there's an element of, sort of,
5 gaslighting here, right, in that here you have Dr. Menninger,
6 who is bringing these issues forward, and, you know, being
7 told that PPD is, you know, conducting an investigation, you
8 know, they're reviewing this, doing it the right way.

9 And in reality, you have the person who is, sort
10 of, Wizard of Oz of all of this from the start, standing
11 behind the curtain, who comes back and says, "No, we did a
12 thorough investigate, and none of this is actually
13 happening."

14 That's -- that, I think, from the evidence here
15 that a jury can reasonably conclude that that's what
16 occurred, and that's unlawful.

17 THE COURT: So your damage theory -- is your damage
18 theory essentially that she was disabled? They then violated
19 the law by not sufficiently engaging with her on the
20 reasonable accommodation process; that exacerbated her
21 symptoms; that then they retaliated against her. And then
22 they said what's -- what was happening wasn't happening in
23 the form of the report, and then that further exacerbated her
24 symptoms and that caused her to take leave and then that's
25 why she can't -- I don't know if she's working now or not.

1 MR. HANNON: I would summarize it as you break it,
2 you own it, which is the -- I think the rule by the *Tobin v.*
3 *Liberty Mutual* case, on page 14, the footnote of our brief,
4 that through all of their violations of the ADA and 151(b),
5 that the causal impact of that was that she was no longer
6 able to work because of her disability.

7 I wouldn't necessarily limit it to accommodation in
8 retaliation. I think there's, sort of, a bit of a broader,
9 you know, forest for the trees perspective here of having
10 decided that because of her disability that they did not want
11 her employed; that they took steps that were intended to and
12 did, indeed, have the impact of causing her to be unable to
13 work; that there was a sort of broader theme to all of this.
14 And it could be compartmentalized and considered analytically
15 in different ways, but at the end of the day, just because
16 someone has a disability doesn't mean you can jump to the
17 conclusion that they can't do their job and try to force them
18 out.

19 THE COURT: Okay. Ms. Mandel, anything else?

20 MS. MANDEL: Thank you, Your Honor.

21 On that last point that brother counsel raised, I
22 just want to be clear that the evidence is -- is rife with
23 indicators that Dr. Menninger couldn't do a number of the
24 portions of the job, if any of it, even as of January 2018.
25 In fact, Dr. Menninger's own husband testified under oath

1 that she was not able to work at all as of January of 2018.
2 Obviously, her husband wasn't an expert, but he was someone
3 who was close to her and --

4 THE COURT: Here's a thing about that, though.
5 That strikes me as good evidence for you at trial, right, if
6 her husband, you have him under oath, under the Social
7 Security process, saying that in his view, she wasn't capable
8 of working in January of 2018. But I think what I have on
9 the record here is she's saying I could work in January 2018.
10 And to the extent that's a disputed issue of fact, I have to
11 draw the inference in her favor. And so I don't see how -- I
12 don't think I have a record that's sufficiently clear that on
13 summary judgment I could say, you know what? She wasn't
14 working on January 2018. She wasn't capable of working on
15 January 2018, before they knew about the disability; that all
16 of these things that happened, that they were, like, engaging
17 in a process to terminate her because -- or that, you know,
18 because of things that happened before they got the e-mail.

19 And so that strikes me as you could defend the case
20 at trial, if it goes -- I'm not saying that it does go to
21 trial. But if it does go to trial, I could see a defense at
22 trial, part of what was going on is she wasn't performing.
23 And -- but I don't know how I can decide that on summary
24 judgment.

25 MS. MANDEL: Understood, Your Honor. And in fact,

1 we're not asking --

2 THE COURT: Right. I know you're not asking on
3 performance.

4 MS. MANDEL: I actually think that's ultimately
5 more on damages, which was the last point that brother
6 counsel was raising.

7 THE COURT: Okay. Fair.

8 MS. MANDEL: I don't think that's terribly -- I do
9 think that to the extent that Dr. Menninger and her counsel
10 are now trying to paint this a little bit differently, as she
11 was essentially fine in January of 2018, and sort of -- I
12 believe that the brother counsel used the term "you break it,
13 you own it," by June of 2018. That's not actually borne out
14 in the record at all. So I just wanted to --

15 THE COURT: Sure. Fair enough. I'm not resolving
16 anything on this decision on damages. I'm just curious.
17 I've been thinking about, sort of, where does this go in
18 terms of damages, because they didn't -- like, they didn't,
19 in 2018, fire her. And so I was wondering if the theory was
20 more like what you described.

21 MS. MANDEL: And in fact, from our perspective,
22 even if this goes to trial -- even if there were some type of
23 legal finding of wrongdoing, I think the damages question is
24 essentially, you know, another reason that this case doesn't
25 really prevail for Dr. Menninger. But I do think that's sort

1 of beside the point right now.

2 I do want to respond to a few things that brother
3 counsel said.

4 THE COURT: Yes.

5 MS. MANDEL: And most specifically, I wanted to
6 make sure to draw this Court's attention to paragraph 39, in
7 the statement of undisputed facts, which is -- it's actually
8 noted as undisputed by plaintiff. This is the paragraph
9 laying out Dr. Kessimian's recommended accommodations, which
10 were sent in February of 2018. And I just really wanted to
11 point to the beginning of that.

12 It's a written message, and this is a direct quote,
13 so I'm not sure how it could be disputed anyway. But I just
14 wanted to be clear that that e-mail -- or that written
15 communication from Dr. Kessimian specifically stated, at the
16 outset, that, "Dr. Menninger's brain and body are not able to
17 tolerate public speaking engagements and socializing." And
18 this is where Your Honor points out, it says, "It is as if
19 her vocal cords become paralyzed."

20 And so to the extent --

21 THE COURT: Wait. Are you looking at 38 or 39?

22 MS. MANDEL: 39. It's at the top of page 12.

23 THE COURT: Top of page what?

24 MS. MANDEL: 12.

25 THE COURT: I have 21 at the top of page 12.

1 MS. MANDEL: I'm actually looking at defendant's
2 statement of undisputed facts, but we can absolutely jump to
3 the --

4 THE COURT: Oh. 39. I have it. It starts, "The
5 assertion of fact is, on February 14, 2018, Dr. Kessimian
6 sent her recommended" --

7 MS. MANDEL: Exactly. Exactly.

8 THE COURT: Okay. Sorry. Go ahead. I'm with you.

9 MS. MANDEL: And in stepping back for a moment, I
10 think that brother counsel paints a set of facts that, if
11 true, and if supported by the record, would, perhaps, make
12 for a different case. But it's not at all what the record
13 here shows.

14 Your Honor raised this question of didn't
15 Dr. Menninger's own physician say that Dr. Menninger couldn't
16 perform the job tasks. And brother counsel said, no, that's
17 not -- that Dr. Kessimian was simply laying out
18 accommodations that would allow Dr. Menninger to better
19 perform her job.

20 But in fact, Dr. Kessimian -- this document, which
21 became sort of the main focus of this case, really begins by
22 Dr. Kessimian saying that Dr. Menninger cannot engage in
23 these fundamental job tasks. It says it in black and white.

24 And it's undisputed -- for legal purposes of
25 undisputed by the plaintiff, but it's also in this exhibit in

1 the case, where Dr. Kessimian states that Dr. Menninger is
2 simply unable. It says that her brain and body don't allow
3 her to do this. I'm not sure what other evidence could
4 possibly exist in the case to show more clearly that the
5 plaintiff was not able to perform these fundamental job
6 tasks.

7 And so, you know, jumping forward to what the
8 company had to do or could have done to engage in a better
9 dialogue about the job tasks, brother counsel said that the
10 company didn't want to have a tit for tat. And brother
11 counsel also said that's what the law requires.

12 First of all, I think that's very clearly not what
13 the law requires, to engage in a tit for tat. There's an
14 obligation to have an interactive dialogue. But once the
15 dialogue has really started out with the statement that
16 Dr. Menninger cannot do this category of things, to require
17 the company to come back and now try to tease out which part
18 of the -- of the tasks you might be able to do, and it says
19 she can't do any -- her brain does not even allow her to
20 engage in this type of public dialogue or private discussion,
21 it wouldn't be practical.

22 And to take this back -- I know it may seem a bit
23 silly, but take this back to the lawyer analogy because it's
24 something that I think that all of us here can understand
25 more directly. Right? Let's say a law firm decides we're

1 going to get more into an appellate litigation, and we're
2 going to have more focus on those types of arguments. Right?
3 In the coming year, that's going to be a goal of ours.
4 That's nondiscriminatory and completely permissible for the
5 law firm to do.

6 For a lawyer to come back and say, "Well, I'm going
7 to need you to spell out in more detail. Will there be men
8 in the room? Women in the room? How many people will be in
9 the room? Will it be cases about this type of topic or X
10 type of topic"; that wouldn't be a reasonable obligation for
11 the law firm to have, to say all of our lawyers need to be
12 able to engage in this type of appellate argument. Right?
13 That's just a requirement that we have.

14 That's facially neutral. It in no way gets at
15 someone's protected disability. And to require that type of
16 granular discussion in a theoretical sense wouldn't be,
17 really, very logical or --

18 THE COURT: Well, but if the lawyer came back and
19 said, "I had a particular type of experience that was
20 particularly traumatic, so a particular kind of criminal
21 cases that involve that experience being done to other people
22 are the kind of cases that would be -- that would trigger my
23 trauma. But I could do any other kinds of cases, so I'd like
24 to know whether we're going to be going into -- focusing on
25 that area, which might be, like, you know, I need a big

1 accommodation, or whether that's just within the range. And
2 if it's within the range, I just want the reasonable
3 accommodation not to do those." And that seems like a
4 reasonable inquiry.

5 And the firm would be reasonably required to
6 respond, I think, to say, either, "No, we're focusing on that
7 kind of case," or, "That will be in the mix," or, "We don't
8 have any of those right now. We can deal with it. But,
9 like, we can make sure that you don't have to work on those."

10 MS. MANDEL: Absolutely. And to kind of bring the
11 analogy back to the facts of this case, if the documentation
12 had said interactions with a certain type of business is
13 traumatic.

14 THE COURT: You mean because it says any kind of a
15 public.

16 MS. MANDEL: Right. It says very clearly brain and
17 body are not able to tolerate public speaking engagements,
18 socializing. It's a very broad statement.

19 In fact, at no point did either the treatment or
20 her treating physician come back and say, "Actually, it would
21 be limited in the following way." The response was
22 essential, "That's not really part of my job that I should
23 have to do, so you can't tell me that I should have to do
24 that." Instead of saying, "No, no, no, it's a little bit
25 more limited than this. Some things would work, and some

1 things wouldn't." That conversation never happened. To the
2 extent we're really looking at the evidence in the record for
3 summary judgment purposes, this evidence is quite clear that
4 the plaintiff's own treating physician said that she was
5 unable to do this. Right.

6 So it's not -- I understand brother counsel wishes
7 the facts were different today, but they're not. This is
8 what the evidence shows. And to have a requirement that the
9 company come back and make some sort of alternate proposal
10 around the details of what each engagement would require is
11 not reasonable, and it's not something that they're obligated
12 to do.

13 And in fact, Dr. Menninger completely removed
14 herself from that. Right? She said repeatedly, "That's not
15 really part of her job. It's not something she should have
16 to do," while her doctor was saying she can't do that. So it
17 really puts the company into, essentially, an impossible
18 position. It's not required by law at all.

19 I also wanted to just bring up something else that
20 brother counsel mentioned. He said that the outward-facing
21 goal of more client interaction wasn't something that was
22 agreed upon. There's no legal requirement that an employee
23 agree to any facially neutral requirement.

24 THE COURT: Right.

25 MS. MANDEL: The company could decide this is part

1 of our future. This is why we're headed.

2 THE COURT: Sure.

3 MS. MANDEL: And in fact, the other thing that I
4 think is really important to note here, which is factually
5 important, as the evidence shows, Dr. Menninger's role is --
6 she was the executive director of labs. She wasn't in, say,
7 a law firm with ten litigators who could kind of divide and
8 conquer. Right? She was the person in this role, this
9 person responsibility for the accreditation of multiple labs
10 and multiple locations. There wasn't a whole team of people
11 where the company would have reasonably been required to come
12 back and say, "Okay, what if we divided up this way? And
13 what if you only had the obligation to go to this kind of
14 presentation?" It wouldn't have made any sense.

15 There's a whole body of law around these kind of
16 high-level executive accommodations. It's not something
17 where her job could have been or should have been open to
18 being subdivided in that way.

19 And I also just wanted to touch on the retaliation
20 piece, as well. Again, brother counsel wants to retest the
21 facts of being different now. There's absolutely no
22 indication that Ms. Ballweg was investigating herself, should
23 have been investigating herself. I believe the term
24 "gaslighting" was used. Again, that's really
25 recharacterizing the facts in a way that's not borne out by

1 the record at all. And I know that the plaintiff would now
2 like to, sort of, try to save that claim by explaining or
3 describing the facts in a different way, but that's not at
4 all borne out by the facts.

5 The sham investigation cases talk about not
6 actually speaking to any witnesses, not going through a
7 thorough process to get to the bottom of what the employee is
8 complaining about. There is absolutely no evidence of that
9 here at all. The company is not required to have 50 HR
10 employees or to engage an outside investigator for every
11 employee complaint. That would be an unreasonable
12 expectation, and it's not borne out by any law regarding
13 retaliation or investigations.

14 THE COURT: Okay.

15 MS. MANDEL: Thank you, Your Honor.

16 THE COURT: Real quickly?

17 MR. HANNON: Very quickly, Your Honor.

18 The evidence is what I'd like the Court to look at,
19 Your Honor. And rather than taking a small little bit of
20 what Dr. K said, you can look at the whole thing. Dr. K did
21 not say that Dr. Menninger's brain and body are not able to
22 tolerate public speaking engagement and socializing. What
23 she did was, after describing what her disorder was, she
24 said, "A concrete way of thinking of this disability is that
25 her brain and body are not able to tolerate public speaking

1 engagements/socializing. And it is as if her vocal cords and
2 brain will paralyze, while her blood pressure, heart rate,
3 and breathing all increase. And it is for all of the above
4 reasons that I recommend the following reasonable
5 accommodations." Whenever she can't do that.

6 She was trying to convey to them, sort of teach
7 them that this isn't about Dr. Menninger being shy. Right?
8 That's the problem you deal with people with mental health
9 disorder, they think it's made up, it's not real. And she's
10 trying to impress upon them that there are physiological
11 aspects of that. But to take that and turn it around and to
12 conclude, as a matter of law, that that is a statement that
13 she is incapable of doing these things is not accurate.

14 If they had a question about whether or not she
15 could do these sort of things, they could ask her those
16 questions. They could have gone back to Dr. K and got more
17 information.

18 Dr. K finishes her note, "I am available for
19 further discussion." They didn't take her up on that.

20 This wasn't about them being confused. This wasn't
21 about them having to deal with one alternative versus the
22 other. They, sort of, paint this horrific scenario where, in
23 order to accommodate her, they're going to have to do all of
24 these things. Judge, there are miles and miles of
25 possibilities in between, and they didn't pursue any of them.

1 They simply threw up their hands, and they said, "Game over."
2 And they can't do that.

3 THE COURT: Okay. Thank you.

4 I'll take it under advisement. This is really
5 helpful, the argument from both of you. I appreciate it a
6 lot.

7 I'll think about it, and I will promise that it
8 will not take me as long to resolve this, as it did for me to
9 get to a hearing. And I'm sorry it's taken me too long to get
10 to a hearing. It really shouldn't take that long. And I
11 have no good -- no good excuse for that. So I'm sorry.

12 All right. Thank you. We're adjourned.

13 THE DEPUTY CLERK: All rise. Court is in recess.

14 (Court in recess at 11:16 a.m.)
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATE OF OFFICIAL REPORTER

I, Rachel M. Lopez, Certified Realtime Reporter, in and for the United States District Court for the District of Massachusetts, do hereby certify that pursuant to Section 753, Title 28, United States Code, the foregoing pages are a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 12th day of February, 2024.

/s/ RACHEL M. LOPEZ

Rachel M. Lopez, CRR
Official Court Reporter